Fujian Lianfu Forestry Co., Ltd., et al.
v. United States
Court No. 07-00306; Slip Op. 09-81 (CIT 2009)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce ("Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or the "Court"), issued on August 10, 2009, in *Fujian Lianfu Forestry Co., Ltd., et. al. v. United States*, Court No. 07-00306, Slip Op. 09-81 (CIT 2009) ("*Fujian v. United States* (CIT 2009)"). These final results concern the *Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China*, 72 FR 46957 (August 22, 2007), as amended, 72 FR 62834 (November 7, 2007) ("*AR 1 Final Results*"). As set forth in detail below, in these final results, pursuant to the Court's remand order, we have (1) reconsidered the appropriateness of the adverse facts available ("AFA") rate applied to Starcorp Furniture Co., Ltd., Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co., Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd., (collectively "Starcorp") in *AR 1 Final Results*, and provided further explanation as to how the selected 216.01 percent rate is both reliable and relevant to Starcorp; and (2) reexamined the record evidence, and explained why the assignment of combination rates is not warranted in this administrative review.

On November 16, 2009, the Department issued the Draft Results of Redetermination Pursuant to Court Remand "*Draft Results*" and provided parties seven days to comment. On November 17, 2009, Starcorp requested that the deadline for the submission of comments on the *Draft Results* be extended from November 20, 2009, to November 30, 2009. On November 18,

2009, the Department released the electronic data to parties pertaining to the corroboration issue and granted Starcorp an extension until November 25 to submit comments on the *Draft Result.* On November 23, 2009, Starcorp submitted a second request for a deadline extension due to errors in the electronic data released by the Department.[1] The Department re-released the electronic data to the parties on November 24, 2009, and granted all parties until COB November 30, 2009 to submit their comments on the *Draft Result*. On November 30, 2009 the Department received comments from Starcorp and Petitioners.[2]

B. BACKGROUND

Corroboration

In *AR 1 Final Results*, we selected a total AFA rate of 216.01 percent for Starcorp. The Department explained that the rate was sufficiently corroborated within the meaning of section 776(c) of the Tariff Act of 1930, as amended ("Act"), because the rate was a company-specific, non-adverse rate calculated for another exporter of wooden bedroom furniture during a contemporaneous period. *See AR 1 Final Results*, 72 Fed. Reg. at 46963; *see also Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004-2005 Semi-Annual New Shipper Reviews*, 71 Fed. Reg. 70,739, 70,740 (Dec. 6, 2006).

The Court remanded the selection of the 216.01 percent rate, as it applies to Starcorp, for reconsideration and explanation, "as to why the rate represents a 'reasonably accurate estimate of

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[1] With respect to the initial release, the Department discovered that while the program and the underlying data were identical to that contained in the hard copy print out, the formatting of the two did not align due to a mechanical error. In addition, the output file released with the program and underlying data did not appear to be completely consistent with the hard copy release. The Department re-released the data in electronic form, confirmed that there were no problems with the second release, and extended the comment period for the parties to accommodate the timing of the second release of the electronic version of the data. *See* the memorandum to the file regarding: Wooden Bedroom Furniture from the People's Republic of China – Fujian Lianfu Forestry Co., Ltd., eta. v. United States, dated November 24, 2009.

[2] Petitioners in this proceeding are the American Furniture Manufacturers Committee for Legal Trade, hereinafter referred to as "Petitioners" or "AFMC."

the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.'" *Fujian v. United States* (CIT 2009), at 11, *citing DeCecco*, 216 F.3d at 1032.

Combination Rates

The Department reviewed 56 companies and calculated preliminary margins that ranged from 1.24 percent to 216.01 percent. *See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Reviews and Partial Rescission Notice,* 72 FR 6201, 6220-6221 ("*Preliminary Results"*). Before the Department, American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company ("AFMC") argued that the Department should assign combination rates in the contested review, which are single rates assigned to a combination of the exporter and its supplier(s). *See* 19 CFR 351.107(b). AFMC contended, *inter alia*, that the assignment of combination rates was appropriate because unless combination rates are employed, the disparity in dumping margins assigned under the wooden bedroom furniture order creates an incentive for firms with high dumping margins to shift exports to exporters with low cash deposit rates. *See AR 1 Final Results*, and accompanying Issues and Decision Memorandum at Comment 5, pp. 55-57, P.R. 1185, frs. 55-57.

For *AR 1 Final Results*, the Department explained that while it may assign combination rates pursuant to 19 CFR 351.107(b)(1), the circumstances did not warrant the assignment of combination rates in this instance. *See AR 1 Final Results*, and accompanying Issues and Decision Memorandum at Comment 5, pp. 57-58, P.R. 1185, frs. 57-58, *citing Final Results of Antidumping Duty Administrative Review: Certain In-Shell Raw Pistachios from Iran*, 70 FR 7470 (February 14, 2005) ("*Pistachios from Iran*"). However, because the Department did not fully explain the reasons for its conclusions, the Department requested and this Court granted a

voluntary remand for purposes of reexamining the record evidence, and to provide a reasoned explanation for our conclusions. *See Government Brief*, Nov. 3, 2008; *Fujian v. United States* (CIT 2009), at 4-5.

C. ANALYSIS

1. Corroboration of a total AFA rate of 216.01 percent for Starcorp

After a careful and thorough reconsideration and re-examination of the record evidence, the Department continues to find that a rate of 216.01 percent, as it relates to Starcorp, is sufficiently corroborated within the meaning of section 776(c) of the Act. Pursuant to the Court's instructions, we have further explained how the selected rate relates to Starcorp.

Section 776(c) of the Act provides that, when the Department relies on secondary information as facts available, rather than on information obtained during the course of the administrative review, it must corroborate, to the extent practicable, that information from independent sources that are reasonably at its disposal. To corroborate secondary information, to the extent practicable, the Department must "examine whether the secondary information to be used has probative value." *See* 19 CFR 351.308(d). Probative value means that the rate must be both reliable and relevant. *See Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 58642 (October 16, 2007), at Comment 6; *see also Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H.R. Rep. No. 103-316 at 870 (1994)*.

As this Court recognized, the Department "may begin its total AFA selection process by defaulting to the highest rate in any segment of the proceeding." *See Fujian v. United States* (CIT 2009*)* at 10. Indeed, in order to induce respondents to provide the Department with

complete and accurate information in a timely manner, the Department's practice is to select, as AFA, the higher of either: (1) the highest margin alleged in the initiation; or (2) the highest calculated rate for any respondent in any segment of the proceeding. *See, e.g.*, *Certain Tissue Paper Products From the People's Republic of China: Final Results and Partial Rescission of the 2007-2008 Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 74 FR 52176, 52177 (October 9, 2009) (the Department applied as AFA the highest rate on the record of any segment of the proceeding); *Final Determination of Sales at Less Than Fair Value: Certain Artists Canvas from the People's Republic of China*, 71 FR 16116, 16118-19 (March 30, 2006) (the Department applied the rate from the petition as AFA).

On remand, the Department is instructed to explain how the rate selected as AFA for Starcorp represents a "'reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.'" *See Fujian v. United States* (CIT 2009), citing, *De Cecco*, 216 F.3d at 1032. In the instant review, because Starcorp failed to cooperate to the best of its ability, and its reported period of review ("POR") data is unreliable,[3] we find that Starcorp's company-specific information, reported for the relevant period, cannot be a reliable metric for purposes of corroborating the 216.01 percent AFA rate. Because Starcorp has provided the Department with no reliable information during the first administrative review, we are not in a position to speculate what Starcorp's margin might have been during this period had it cooperated. *See* SAA at 870 ("{P}roving that the facts selected are the best alternative facts would require that the facts available be compared with missing information, which obviously cannot be done."). However, in this instance, certain of Starcorp's information, including the Department's analysis memoranda for Starcorp, from the segment immediately

[3] The Department found Starcorp's reported information to be wholly unreliable, and this Court affirmed the Department's conclusion. *See Fujian* (*CIT 2009*) at 14-25, and Order.

preceding the instant review (*i.e.*, the investigation) was placed on the administrative record of *AR 1 Final Results*, during the first administrative review segment of the proceeding.[4] Additionally, we have examined Starcorp's program output and underlying data showing the range of model-specific margins, from the original investigation, which we are placing on the record of this remand.[5] Thus, for purposes of corroboration, we were able to examine Starcorp's model-specific weighted average dumping margins from the previous segment in relation to the 216.01 percent margin.[6]

Courts have consistently affirmed the Department's selection of AFA margins where the Department was able to corroborate the selected margin using the respondent's own transaction specific margins, either from the POR at issue, or a previous POR. *See PAM, S.p.A. v. United States, 2009 U.S. App. Lexis 21118, at 9-10, Court No.*, 2009-1066, (Fed. Cir., Sept. 24 2009); *Ta Chen v. United States*, 298 F.3d 1330, 1339-40 (Fed. Cir. 2002); *Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d.1273, 1279 (CIT 2007). Further, AFA rates have been found to be adequately corroborated when they are "reflective of some, albeit a small portion" of the respondent's sales. *See PAM v. United States*, Ct. Int'l Trade LEXIS 73, 12-13, Slip. Op. 2008-

[4] *See* letter from King and Spalding dated October 27, 2006, titled "Wooden Bedroom Furniture from the People's Republic of China: Submission of Factual Information from Original Investigation," P.R. 618, frs.1-16, N.P.R. 215.

[5] The information from the original investigation that was placed on the record of *AR 1 Final Results* included the Department's analysis memoranda completed for Starcorp, but did not include the actual program output and the program's underlying data. *See* Attachment 1 for the margin calculation output; Attachment 2 for the range of model-specific weighted average dumping margins.

[6] When calculating overall margins for respondents in original investigations, the Department typically calculates model-specific margins, as opposed to administrative reviews, where the Department typically calculates transaction-specific margins. A model specific margin is based on a comparison of a weighted average net U.S. price of a specific model of the product under investigation to the normal value ("NV") calculated for that same model; whereas, a transaction-specific margin is the comparison of the net U.S. price and normal value of an individual transaction. For example, if there were seven sales of model x, in an investigation there would be a single margin calculation based on the average net price for all U.S. sales of that model, these model-specific margins would then be weight averaged to derive the overall dumping margin for the respondent. Given the same scenario in an administrative review, the Department would calculate seven transaction-specific margins (one for each sale of that same model), rather than a single model-specific margin, and the individual transaction margins would then be weight averaged to derive the overall dumping margin for the respondent.

75 (CIT Jul. 9, 2008) *quoting Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339-40 (Fed. Cir. 2002), aff'd *PAM, S.p.A.* 2009-1066.

Our examination of Starcorp's information from the investigation revealed that the AFA rate of 216.01 percent that was selected for Starcorp during *AR 1 Final Results* falls within the range of Starcorp's calculated model-specific weighted average dumping margins from the investigation.[7] Specifically, we found several model-specific margins above 216.01 percent.[8] Moreover, the margins above 216.01 percent were based on several of Starcorp's product categories and they reflect a wide range of sales and prices.[9] Thus we have determined that the sales on which margins above 216.01 percent were calculated are indicative of Starcorp's selling practices such that they can be relied upon for corroboration purposes.

Accordingly, because the 216.01 percent rate falls within the range of certain model-specific margins calculated from Starcorp's own reported information and data from the investigation, we find the 216.01 percent rate, applied as AFA for Starcorp, has probative value, *i.e.*, is reliable and relevant to Starcorp and thus is sufficiently corroborated within the meaning of section 776(c) of the Act.

2. Application of combination rates

After re-examining the record of the instant review, we continue to find that the assignment of combination rates is not appropriate in this instance. 19 CFR 351.107 of the Department's regulations provides for the establishment of combination rates, which are rates assigned to a non-producing exporter in combination with its supplier(s). *See* 19 CFR

[7] *See* Attachment 1 at page 69.

[8] *See* Attachment 2.

[9] *See* Attachment 1, at p. 69, and Attachment 2.

351.107(b)(1). In other words, if a combination rate is assigned, the exporter's established dumping margin would apply only when its merchandise is sourced from the producers it sourced from during the administrative review.

According to 19 CFR 351.107(b)(1), "{i}n the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the {Department} may establish a 'combination' cash deposit rate for each combination of the exporter and its supplying producers." However, the preamble to 19 CFR 351.107 contemplates that "if sales to the United States are made through an NME trading company, we assign a non-combination rate to the trading company…" *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27303 (May 19, 1997) ("*Preamble*").

It is the Department's practice[10] not to apply combination rates in administrative reviews. Nevertheless, the Department has considered exceptions to this practice on a case-specific basis, and in certain reviews has considered whether it was appropriate to apply a combination rate in an administrative review based on the factors set forth in *Pistachios from Iran*, an administrative review where the Department has applied a combination rate.[11] In *Pistachios from Iran*, the Department exercised its discretion and assigned a combination rate in an administrative review to the exporter and its supplier of merchandise based on the specific circumstances of that case which included among other things: (1) the similarity of the exporter's single U.S. sale subject

[10] Policy Bulletin 03.2 covers combination rates in new shipper reviews, not administrative reviews, while Policy Bulletin 05.1 applies to investigations only. Policy Bulletin 03.2 is on the Department's website at http://ia.ita.doc.gov/policy/bull03-2.html.

[11] *See, e.g., Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 76336 (December 16, 2008), and accompanying Issues and Decision Memorandum at Comment 10; *see also Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review* 73 FR 40293 (July 14, 2008), and accompanying Issues and Decision Memorandum at Comment 1; *see also Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 7013 (February 10, 2006), and accompanying Issues and Decision Memorandum at Comment 2.

to the review and the exporter's single U.S. sale in the previous new shipper review in which a combination rate was applied; (2) the exporter's normal business practice of selling pistachios only to the U.S. market; (3) the exporter's ability to source the pistachios it sells from a large pool of suppliers; and (4) high cash deposit rates for other producers subject to the order and a high "all-others" rate. *See Pistachios from Iran* at Comment 2.

We have examined the facts in the instant review and found that the specific facts and circumstances that led the Department to apply a combination rate in *Pistachios from Iran* do not exist. First, in *Pistachios from Iran*, the Department found that there was a compelling argument for establishment of a combination rate in that review "because, by nature, Nima's {the exporter's} single sale to AHON {the U.S. customer} in the instant review is very similar to that of its new shipper sale, in which a combination rate was applied." *See id*. The Department, in its Policy Bulletin Number: 03.2, "Combination Rates in New Shipper Reviews," dated March 4, 2003,[12] explained that in new shipper reviews,

> there are concerns that the overly broad application of the bonding privilege and new shipper cash deposit rate diminishes the discipline of an order, particularly where other producers export through the new shipper to take advantage of benefits intended to apply solely to parties involved in the requested new shipper review. Once a new shipper review is initiated, and even after it is concluded, an exporter designated as a new shipper may become a conduit for exports from producers not involved in the new shipper review, as such producers would typically find it financially advantageous to channel their merchandise through the new shipper.

Policy Bulletin 03.2. In the administrative review of *Pistachios from Iran*, the sale being reviewed and the sale from the prior new shipper review shared several key characteristics that were similar, if not identical. For instance, in the administrative review and the previous new shipper review, the non-producing exporter made only a single sale of subject merchandise

[12] Policy Bulletin 03.2 is on the Department's website at http://ia.ita.doc.gov/policy/bull03-2.html.

during the POR. *See Pistachios from Iran* at Comment 2. Additionally, the price and quantity for both the new shipper sale and the administrative review sale were similar. Finally, the mode of transportation between the sale in the administrative review and the new shipper review were identical. *See id*. For these, as well as other reasons, the Department determined to apply a combination rate in the administrative review.

Here, there is no evidence on the record to demonstrate that the specific circumstances that compelled the Department to apply a combination rate in *Pistachios from Iran* (*i.e.*, the similarity of the new shipper sale and the administrative review sale) exist in the instant review. Specifically, none of the companies subject to the instant review participated in a prior new shipper review. Further, with respect to the exporters identified in Exhibit 1 that was provided by Petitioners in their brief to the Court, there is no evidence on the record for us to determine that the price, quantity, mode of transportation, and number of sales of these respondents in the previous segment were similar to the instant administrative review, because with the exception of Foshan Guanqui Furniture, they were not examined in the investigation. Further, while Foshan Guanqui Furniture was a separate rate respondent in the prior investigation, there is no evidence on the record to determine whether its sales during the POR of the instant review were similar to its sales during the investigation.

Our regulation further contemplates that when deciding whether combination rates are appropriate, the Department will consider the practicability of their assignment. *Preamble*, 62 Fed. Reg. at 27303 (". . .it may not be practicable to establish combination rates when there are a large number of producers"). In *Pistachios from Iran*, the Department noted that applying combination rates was administratively feasible in that segment of the proceeding because the Department established one combination rate for the sole combination of exporter and producer

subject to that review. *See Pistachios from Iran* at Comment 2. Here, in contrast, the application of combination rates would be too large of an administrative burden to be practicable. "The Department would be required to list producer/exporter combinations for the individually reviewed respondents as well as the numerous separate rate companies that are reviewed in each segment."

Furthermore, this number would grow exponentially with each successive review. If we were to assign combination rates, the Department would be required to manually create a page in U.S. Customs and Border Protection's ("CBP") ACS Module for every combination of exporter/producer, including situations where the exporter was also the producer of the subject merchandise (*i.e.*, not just for non-producing exporters). Recent technological improvements to CBP's information system, such as the potential transition to ACE, do not lessen the administrative burden, as the Department would still be required to create a module for every combination of exporter/producer. Additionally, with such a large number of mandatory and separate rate respondents, providing CBP with accurate instructions, after each segment, would be impractical to complete, as it would require us to enumerate every combination of exporter/producer. Thus, we find that assigning combination rates in this review is not administratively feasible.

Finally, while the assignment of combination rates is one means of addressing AFMC's concerns of firms with high cash deposit rates shifting their exports to the United States through firms with low cash deposit rates through illegitimate business activities, *i.e.*, improper "funneling," it is not the only mechanism to address this concern. Interested parties may, of course, seek recourse by bringing allegations of fraud to the Department and CBP under CBP's fraud provisions. Additionally, parties may request an administrative review. As administrative

reviews are retrospective, interested parties are able to request reviews of companies where they believe that abuses of the system may be occurring. During the course of a review, the Department is able to fully review the respondent to which the cash deposit rate is being applied, investigate any allegations of improper use, and determine the appropriate action to be taken.

Although the Department, given its limited resources, does not typically have the ability to review every firm requested, if improper use of certain cash deposit rates is the major concern that a requesting party would like examined, requesting parties could focus their requests on firms with low dumping margins.. In the instant review, however, we note that the majority of firms requested for review by AFMC had a 198.08 percent cash deposit rate. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China*, 70 FR 329 (January 4, 2005). Further, AFMC withdrew its requests for review of sixteen companies, each with a relatively low rate of 6.65 percent.

Accordingly, we determine that the assignment of combination rates is not warranted in the instant proceeding because (1) the particular facts present that led to the assignment of a combination rate in *Pistachios from Iran* are not present here; (2) the large administrative burden renders applying combination rates in this instance impracticable; and (3) interested parties have additional mechanisms available through administrative reviews, and CBP, where improper "funneling" concerns may be addressed. Accordingly, the Department continues to find that the application of combination rates is not warranted in the instant administrative review.

D. INTERESTED PARTIES' COMMENTS

1. Corroboration of a total AFA rate of 216.01 percent for Starcorp

Starcorp argues that the Department, in its *Draft Results* corroboration analysis, impermissibly relied on information not on the record of the administrative review. Citing cases including *Cabot Corp. v. United States*, 664 F. Supp. 525, 11 CIT 447 (June 22, 1987) and *Ipsco, Inc. v. United States*, 715 F. Supp 1104, 1109, 13 CIT 489, 494-95 (June 15, 1989), Starcorp contends that judicial review of a final determination by the Department is limited to the administrative record developed over the course of that segment of the proceeding. Starcorp argues that the information relied upon by the Department to corroborate its AFA margin of 216.01 percent represents new factual information and new data that was not part of the administrative record for the challenged administrative review, and therefore, it is not appropriate for use in this redetermination pursuant to remand.

Furthermore, Starcorp contends, the CIT has not remanded this case to the Department to re-open the administrative record and conduct further proceedings, as it has in cases such as *Daido Corp. v. United States*, 869 F. Supp. 967, 973, 18 CIT 1053, 1059-60 (Nov. 10, 1994). In fact, according to plaintiffs, "nowhere in the Court's remand does it contemplate the re-opening of the administrative record to support the Department's erroneous selection of a total AFA rate of 216.01 percent for Starcorp." *See* Starcorp's comments at page 7. Citing cases including *Ammex, Inc. v. United States*, 341 F. Supp 2d 1308, 1314 n.12, 28 CIT 1208, 1215 n.12 (July 20, 2004), Starcorp argues that re-opening the administrative record is inappropriate in the instant case because the record here does not support the Department's "erroneous" decision, as contrasted with a record that was "inadequate to support any decision" which might necessitate a re-opening of the record. *See* Starcorp's comments at page 8.

Moreover, Starcorp argues that the Department's *Draft Results* fail to meet the corroboration standard articulated in *De Cecco*, 216 F.3d. at 1032. Specifically, Starcorp

contends that the individual transactions with margins above 216.01 percent, relied upon for corroboration purposes by the Department, involve insignificant quantities and volumes of sales. Starcorp further argues that a small quantity and volume of sales above the selected AFA rate, will almost always be found in a dumping margin calculation, ensuring that practically no AFA rate would fail to fall within the range of data. Starcorp contends that the circumstances of this case mirror those presented in *PAM, S.p.A. v. United States*, 495 F. Supp. 2d 1360, 1371 (CIT 2007), in that the Department has found a few aberrant, outlier transactions in a small subset of the subject merchandise with dumping margins exceeding the AFA rate. While Starcorp acknowledges that the Federal Circuit has sustained AFA rates under similar circumstances in *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F. 3d 1330 (Fed. Cir. 2002) and *PAM, SpA. v. United States*, Slip Op. 2009 -1066 (Fed. Cir. September 24, 2009), Starcorp argues that this case is distinguishable from those proceedings because the selected rate in the instant case is unreasonably high and thus "can only be punitive in nature." *See* Starcorp's comments at 13. Arguing that the most probative evidence on the record is Starcorp's weighted-average margin of 15.78 percent from the LTFV investigation, Starcorp contends that the Department, by not basing its corroboration on that margin, contravened the Court's remand order and the *De Cecco* directive to ensure that a corroborated AFA rate is an estimate of a respondent's actual rate.

Petitioners argue that the Department overlooked the fact that the underlying data used to generate Starcorp's model-specific margins had already been placed on the record. For the final redetermination pursuant to remand, Petitioners contend that the Department should clarify that only the margin program and its output were not already on the administrative record. Moreover, citing *Gallant Ocean (Thailand) Co v. United States*, 602 F. Supp. 2d 1337 (CIT 2009) and *Universal Polybag Co. v. United States*, 577 F. Supp. 2d 1284 (CIT 2008), Petitioners

recommend other avenues of corroboration in addition to the analysis described in the *Draft Results,* including 1) calculating transaction-specific rather than model-specific margins for Starcorp based on data from the LTFV investigation; and 2) using transaction-specific data from respondents other than Starcorp that participated in the challenged administrative review.

2. Application of combination rates

Petitioners argue that the Department intended to issue combination rates in this instant review as evidenced by the Department's separate rate application ("SRA") that requested information on all exporters' producers and stated that combination rates would be assigned. According to Petitioners, by issuing supplemental SRA questionnaires to gather information on several applicants' producers, the Department's actions contradict the Department's statement in *AR 1 Final Results* that it never intended to apply combination rates in this review.

Next, Petitioners argue that the Department's analysis should not be limited to the four factors examined in *Pistachios from Iran*. Petitioners state that the Department's regulations do not list any factors that must be met for the Department to apply combination rates. Even though the Department identified factors related to its "case-specific" determination in *Pistachios from Iran*, Petitioners contend that those factors cannot always be used as dispositive in other cases.

Additionally, Petitioners argue that the Department's "existing practice" to apply combination rates in administrative reviews on a case-by-case basis is inappropriate. Petitioners maintain that the facts of this review require that the Department use combination rates. For instance, Petitioners argue that the Department has already acknowledged that "respondents in this administrative *may have the ability* to source wooden bedroom furniture from a large pool of PRC suppliers, some of which may be subject to a high 'PRC-wide' rate." Additionally, Petitioners claim that the Department never addresses that "{A}bsent combination rates, the

large disparity in the rates calculated in the final results creates an environment that motivates firms that are assigned high dumping margins to shift exports to exporters with low cash deposit rates." Finally, Petitioners contend that the Department needs to address that "{T}here are tens of thousands of firms producing subject merchandise in China but only a handful have cash deposit rates below 35.78 percent. Thus, the shifting of exports of wooden bedroom furniture could occur on a staggering scale if combination rates are not employed by the Department."

Also, the Petitioners argue that the Department failed to address evidence cited by Petitioners in their brief. Specifically, Petitioners argue that the Department never addresses that the following: (1) "{T}he record is clear that during the review period, exporters did ship merchandise produced by other manufacturers. For example, one of the mandatory respondents, Foshan Guanqiu Furniture Co., Ltd. ("Foshan Guanqiu"), reported that, in addition to producing subject merchandise, it also purchased and shipped subject merchandise from three suppliers;" (2) "{N}on-mandatory respondents also shipped subject merchandise to the United States that were produced by producers/suppliers other than the named respondent; and (3) all of the producers listed in Exhibit 1 of Petitioners' Rule 56.2 Brief were subject to the PRC-wide rate when the review began, and only Dongguan Mingsheng Furniture Co., Ltd. received a separate rate in *AR 1 Final Results*.

Moreover, Petitioners state that the Department misstates the record evidence. Petitioners argue that the Department stated that "none of the companies subject to the instant review participated in a prior new shipper review." Petitioners claim that Shenyang Kunyu Wood Industry Co., Ltd. participated in the first new shipper review and the first administrative review.

In addition, Petitioners claim that the following five companies had requested their own review and were more like new shippers: (1) Kunwa Enterprises Company; (2) Profit Force Limited; (3) Wan Bao Cheng Group Hong Kong Co. ("Wan Bao"); (4) Yongxin Industrial (Holdings) Limited ("Yongxin"); and (5) Dongguang New Technology Import & Export Co., Limited ("New Technology"). According to Petitioners, these five respondents have not been reviewed in the prior proceedings and requested a review of their own sales in order to establish their separate rate status. Petitioners argue that these five respondents exported only a small quantity of subject merchandise, and none shipped more than 1.5 containers during the review, like many new shippers.

Next, Petitioners contend that applying combination rates is not overly burdensome. Petitioners suggest that the Department would only need to create nine distinct combination rates for the producer/exporter combinations listed in Exhibit 1 of its Case Brief. Petitioners also argue that the Department has managed the assignment of combination rates effectively in *Certain Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) ("*Off-the-Road Tires*"), where the Department established cash deposit rates for the 48 separate combinations in that investigation.

Finally, Petitioners argue that the *Draft Results* overstate the available avenues to address funneling. First, acknowledging that not all U.S. importers that receive "funneled" merchandise are necessarily participants in fraudulent activity, Petitioners assert that CBP may not have jurisdiction over the parties that engage in fraudulent activities in China. Second, Petitioners aver that requesting an administrative review cannot obtain the same results as through the application of combination rates. According to Petitioners, the Department has recognized that

administrative reviews are not adequate avenues to remedy the funneling of products through low-rate exporters and asserts the Department has acknowledged that it only "normally review{s} two or three companies" in each review. Thus, Petitioners contend, if the companies not selected as mandatory respondents are funneling the products of high-rate producers, there is no opportunity to have their exports individually reviewed. Finally, Petitioners state that they are not the only interested party that may request administrative reviews; thus, they argue they do not have the ability to ensure that any particular respondent is closely examined in a review.

E. DEPARTMENT'S POSITION

1. Corroboration of a total AFA rate of 216.01 percent for Starcorp

For the reasons set forth below, we continue to find that within the context of this review, 216.01 percent is an appropriate adverse margin for Starcorp.

Reliance on information reported by Starcorp during the original investigation

We disagree that the Department is precluded, on remand, from relying on information that Starcorp reported during the original investigation for purposes of corroborating the adverse margin assigned to Starcorp. When the facts warrant the assignment of adverse facts available – as is the case here – the Department often finds itself in the position of needing to look outside the record of the administrative review at issue due to a void of reliable information for the respondent in question. For this reason, the statute specifically provides that an "adverse inference may include reliance on information derived from – (1) the Petition, (2) a final determination in the investigation . . . ; (3) any previous review . . . or (4) any other information placed on the record." *See* section 776(b) of the Act.

In *AR 1 Final Results*, the Department relied on a non-adverse margin calculated for a respondent during a contemporaneous new shipper review. *See* section 776(b)(3) of the Act. On

remand, however, the Department was directed by the Court to reconsider the margin assigned to Starcorp, and if possible, explain how the assigned margin relates to Starcorp. *See Fujian v. United States* at 9-10. Thus, in order to comply with the Court's remand directive to explain how the margin relates to Starcorp, because there was no reliable information from the instant review on the record, in accordance with section 776(b)(2) of the Act, the Department relied on data reported by Starcorp in the most recently completed segment of the proceeding, which in this case was the LTFV.

The data Starcorp reported during the investigation is the ***only*** reliable information reported by Starcorp during the history of the proceeding. Although Starcorp takes issue with our reliance on this information, it does not contest that the information relied upon was its own, reported information. Because this information was available, and it allows us to demonstrate that the selected margin relates to Starcorp, the Department finds reliance on Starcorp's investigation information to be the best means of complying with the Court's remand order. Further, this is consistent with the Department's compliance with the Court's instructions in other proceedings. For example, when completing the remand results affirmed in *Pam v. United States*, the Department relied on Pam's reported information during the prior (the fourth) administrative review to corroborate the selected adverse margin applied in the sixth administrative review. *Pam v. United States*, 2009 U.S. App. Lexis 21118, 2, 8-9.

The Department does not disagree with Starcorp that judicial review must be limited to the administrative record considered by the agency, however, the Department sits as the agency, not as a member of the judiciary. By definition, a remand to the Department is an administrative proceeding in which Commerce makes a new determination in light of the Court's opinion and order. The Department generally does limit its reexamination to the administrative record, but

will sometimes open the record to additional evidence when necessary to comply with the Court's order.

In this case, we did need to place additional evidence on the record in order to comply with the Court's remand order. However, all parties, including Starcorp, were provided an opportunity to review and comment on the information relied upon by the Department for this redetermination pursuant to remand. Specifically, the Department released the margin output in both hard copy (paper) and electronic form to the parties during the conduct of our remand proceeding.[13]

As Petitioners point out, the Department might also have corroborated the selected AFA rate without the use of Starcorp's information, by examining the margins of the other cooperating respondents during the investigation, which courts have also found acceptable. *See Gallant Ocean (Thailand) Co. Ltd. v. United States*, 602 F.Supp.2d 1337 (CIT 2009). However, because the Court specifically directed that the 216.01 rate be tied to Starcorp's data, the Department finds that relying on Starcorp's reported information from the investigation better complies with the Court's remand order.

Corroboration of Starcorp's assigned AFA Margin

We further find that the margin of 216.01 to be sufficiently corroborated within the meaning of section 776(c) of the Act. Moreover, because we are able to tie the assigned margin to Starcorp's reported data, the margin of 216.01, applied in this proceeding, meets the standards

[13] As Petitioners point out, it appears that Starcorp's data submissions from the investigation were also submitted onto the record of the first administrative review in diskette form. *See* P.R. 618, fr. 15 (#193. "Data Submissions in the Investigation (On Diskette)." During the conduct of this remand, however, we have discovered that the electronic data was not scanned onto the CDRoms submitted to the Court, and was thus never part of the administrative record submitted to this Court.

set forth in *DeCecco*, 216 F.3d at 1032. There is no evidence on the record to indicate that the model-specific margins above 216.01 percent are based on aberrant sales transactions. While the model-specific margins over 216.01 percent comprise less than one percent of total sales by quantity or volume, we believe that because they are Starcorp's own sales and represent multiple products, they are indicative of Starcorp's selling practices such that they can be relied upon for corroboration purposes.

When an adverse inference should be drawn, it is important that Commerce select a sufficiently high margin "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See SAA* at 870. While the intent is not punitive an adverse rate serves no purpose at all unless the rate selected induces future compliance. *See Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004). We find that the rate of 216.01 appropriately serves the purpose of inducing compliance because it falls well within the higher range of Starcorp's model-specific margins, and further because this rate is a non-adverse rate calculated for another respondent in the same industry, during a contemporaneous period. The Department finds that the 216.01 percent margin serves as a sufficient deterrent against non-compliance and comports with the Departments long-standing practice, upheld by the Courts, to apply the highest margin on the record of the proceeding that can be corroborated as AFA.

We do not find persuasive Starcorp's argument that Federal Circuit decisions in *Pam v.United States* and *Ta Chen v.United States* are distinguishable because in those cases, lower adverse margins were affirmed. *See Starcorp Remand Comments* at fn 5. In those cases, the Department also followed its practice of using the highest margin on the record of the proceeding that could be corroborated as total AFA and the highest transaction-specific margin to a

respondent as partial AFA and the Federal Circuit found such adverse margins to be successfully corroborated when the margins selected fell within the range of transaction-specific margins calculated for the respondent in question. The Federal Circuit further found it acceptable that the higher range represented either a single sale, or a small subset of the transaction-specific margins. The same methodology was employed here. In both cases, the Federal Circuit affirmed the Department because its determination could be related to the respondents in those cases. That the Department was able to corroborate lower margins in those cases has no bearing on the margin that corroborated using Starcorp's data.

2. Application of combination rates

The Department disagrees with Petitioners' contention that the issuance of questionnaires requesting producer information demonstrates intent on the Department's part to assign combination rates in this review. As an initial matter, during the course of an administrative review, the Department poses numerous questions to parties being reviewed on a variety of topics in an effort to develop a better understanding of their operations. Petitioners are incorrect to assume that the asking of questions signifies a particular decision in the Department's final results of review. In this instant review, the Department inadvertently issued an SRA tailored for an investigation, rather than an administrative review, which is why we explained in both the final results of review and our draft remand redetermination that it was an "inadvertent error." In issuing supplemental questionnaires regarding the separate rate applications, the Department would have drafted questions regarding any record information which it deemed to be unclear or incomplete, as it does with all supplemental questionnaires, as part of the process of determining what information would be necessary for use in the final results of the administrative review. Thus, the asking of the questions does not demonstrate any intent to issue chain rates in the

underlying administrative review. Petitioners had no reason to believe that this was an indication that we would apply combination rates given that it is not our normal practice to assign combination rates in administrative reviews. *See Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 76336 (December 16, 2008), and accompanying Issues and Decision Memorandum at Comment 10 (The Department stated explicitly that it is the Department's practice not to apply combination rates in administrative reviews). Therefore, our request for certain information during the review does not establish a practice of using combination rates in administrative reviews.

The Department agrees with Petitioners' assertion that 19 CFR 351.107(b)(1) does not enumerate specific criteria that must be met for the Department to apply combination rates, and further, agrees that the four factors outlined in *Pistachios from Iran* are not dispositive. Nevertheless, *Pistachios from Iran* is the only instance in an administrative review where we applied combination rates and these factors do provide useful guidance in light of our past practice.[14] Thus, in order to maintain consistency in our practice, the Department finds it appropriate to address the four factors relied upon in *Pistachios from Iran*. Moreover, we have addressed these four factors because Petitioners relied on this particular case in making arguments to Commerce and this Court. *See Issues and Decision* Memorandum, at Comment 5; *see also* AFMC's Rule 56.2 Brief in Support of Motion for Judgment on the Agency Record (April 30, 2008) ("Petitioners' Rule 56.2 Brief") at 19.

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[14] *See, e.g., Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 76336 (December 16, 2008), and accompanying Issues and Decision Memorandum at Comment 10; *see also Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review* 73 FR 40293 (July 14, 2008), and accompanying Issues and Decision Memorandum at Comment 1; *see also Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 7013 (February 10, 2006), and accompanying Issues and Decision Memorandum at Comment 2.

In doing so, we disagree with Petitioners that the facts of this review demonstrate the necessity of applying combination rates. Petitioners first point to the possibility of the misuse of cash deposit rates. For instance, Petitioners argue that:

> "Commerce calculated dumping margins ranging from 0.40 percent to 216.01 percent…Absent combination rates, the large disparity in the rates calculated in the final results creates an environment that motivates firms that are assigned high dumping margins to shift exports to exporters with low cash deposit rates." See Petitioners' Rule Brief (April 30, 2008) at 22.

Additionally, Petitioners claims that:

> "{T}here are tens of thousands of firms producing subject merchandise in China but only a handful have cash deposit rates below 35.78 percent. Thus, the shifting of exports of wooden bedroom furniture could occur on a staggering scale if combination rates are not employed by the Department." *Id*. at 22.

In deciding whether to apply combination rates, the Department is concerned with ensuring the proper application of cash deposit rates. *See Preamble*, 62 Fed. Reg. at 27303. For this reason, Petitioners' broad allegation that there are a range of cash deposit rates, and a large pool of suppliers from whom exporters can source the subject merchandise, is by itself, insufficient because this occurs in many industries subject to AD/CVD orders. In deciding whether combination rates are warranted in a particular review, we look to the totality of circumstances. Here, the existing facts do not demonstrate that combination rates are warranted.

While we acknowledge that some parties that would be subject to high margins may have shipped merchandise through exporters with low margins,[15] this fact alone, does not warrant the application of combination rates in this review. In fact, these producers may be exporting through other exporters for any number of legitimate business reasons, such as, (1) not having an

[15] For instance, *see* Exhibit 1 of Petitioners' Rule 56.2 Brief, which shows that some of the producers exporting through companies with lower rates are subject to the PRC-wide rate.

export license; (2) having a previous relationship with these exporters; or (3) because the exporter lacked an adequate supply of merchandise and sourced to other suppliers.

Petitioners have also pointed to some specific facts they believe support the assignment of combination rates in this review, which we address below. According to the Petitioners, we should apply combination rates to Foshan Guanqiu Furniture Co. Ltd. ("Guanqiu") because "in addition to producing subject merchandise, it also purchased and shipped subject merchandise from three suppliers." *See* Petitioners' Rule 56.2 Brief (April 30, 2008) at 22, Exhibit 1. However, as we explained above, the fact that a producer chooses to ship through different exporters, or the fact that an exporter chooses to source merchandise from multiple suppliers, does not in and of itself constitute improper use of cash deposits by a specific respondent or across all exporters.

Moreover, the history with respect to other parties named by the Petitioners seem to bely their contentions that not applying combination rates leads to an abuse of the lower cash deposit rates. For example, Kunwa Furniture Factory supplied the exporter Kunwa Enterprise Co. during the first administrative review, notwithstanding the fact, that both companies were considered part of the PRC-entity during that period, and thus, were both subject to the high PRC-wide rate during that period. *See id*. Similar scenarios exist with respect to three of the other producer/exporter chains cited by Petitioners: producer Rong Feng Furniture Factory (exporter Wan Bao), producer Yongxing Donnguan Ltd (exporter Yongxin), and Dongguan Yonghe Furniture Manufacturing Co., Ltd. (Exporter Profit Force Ltd.). All of these parties were subject to the PRC-entity rate throughout the first administrative review. Thus, had one of these producers wanted to abuse an exporter's low cash deposit rate, it could have shipped through any one of the hundreds of companies that received an extremely low separate rate from

the investigation, rather than through another company subject to the PRC-wide rate of 198.08 percent. However, the facts in this case demonstrate that the three producers in question supplied exporters that were all subject to the PRC-wide rate during the first administrative review.

The Department further finds Petitioners' argument to treat the five respondents named in their Rule 56.2 Brief (April 30, 2008), as we would parties in new shipper reviews unpersuasive.[16] Specifically, we examined the record and found that the circumstances here do not support Petitioners' contention to treat New Technology; Profit Force Limited; Wan Bao; and Yongxin as new shipper reviews because the record contains insufficient evidence for us to determine the specific circumstances of their sales, as we do not review that level of information for separate rate respondents in administrative reviews. As such, the Department finds that the record does not support a decision to apply combination rates to these companies in the administrative review.

We have also reviewed the record evidence with respect to Kunwa Enterprises, and disagree with Petitioners' assertion that the company would necessarily have received a combination rate had it requested a new shipper review. *See* Petitioners' Comments at 20. Petitioners' argument presumes that in a NSR Kunwa would have been able to make a demonstration that it was entitled to a separate rate. However, in the administrative review, Kunwa Enterprises did not demonstrate an absence of government control over its export activities, both in law and in fact, and was therefore subject to the PRC-wide rate. *See Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture from the People's Republic of China*, 72 FR 46957, 46961; *see also*

[16] These five respondents are 1) Guanqiu; 2) New Technology; 3) Profit Force Limited; 4) Wan Bao; and 5) Yongxin.

Memorandum regarding "Separate Rates Memorandum for the Final Results: Wooden Bedroom Furniture from the People's Republic of China" dated August 8, 2007. Accordingly, the need for combination rates has not been demonstrated. There is no record evidence to support a contention that Kunwa Enterprises could have demonstrated its eligibility for a separate rate in a new shipper proceeding. Petitioners are correct that had Kunwa successfully made this demonstration in a new shipper review that it would have received a combination rate. However, the Department has an established practice of applying such rates in new shipper reviews and that practice does not, in and of itself, warrant application of combination rates in other types of reviews, which is essentially Petitioners argument.

Next, the Department acknowledges that we were in error in the draft results when we stated that "*none* of the companies subject to the instant review participated in the first new shipper review and before the administrative review." According to the Petitioners, Shenyang Kunyu Wood Industry Co., Ltd. participated in the first new shipper review and the first administrative review. *See* Petitioners' Comments at 18. We have examined the information on the record of the administrative review to determine whether the specific circumstances that compelled the Department to apply combination rates in *Pistachios from Iran* exist in this instant review with respect to this respondent. The company's separate rate application does not provide sufficient detailed information for us to determine that the price, quantity, mode of transportation, and number of transactions in the administrative review was similar to those of the new shipper review.[17] Therefore, we find that the record evidence does not support a decision to assign combination rates to Shenyang Kunyu Wood Industry Co., Ltd.

[17] *See* Wooden Bedroom Furniture from the People's Republic of China: Response; Separate-Rate Application; Antidumping Duty Administrative Review, dated April 13, 2006.

The Department disagrees with Petitioners' further assertions that applying combination rates would not be overly burdensome. Petitioners' claim that the "Department would only need to create nine distinct combination rates for those producer/exporter" combination is erroneous. The Department would actually need to apply combination rates to every company that we reviewed during the first administrative review, including the self-producing exporters. Since the administrative review covered 56 exporters, this results in exceedingly more combinations than the nine asserted by Petitioners. Additionally, Petitioners' example of *Off-the-Road Tires* is not applicable here because *Off-the-Road Tires* is an investigation, where the Department has adopted an explicit policy of applying combination rates.[18] The Department has determined combination rates are necessary in investigations to prevent improper use of cash deposit rates, prior to the onset of annual reviews.[19] Finally, the Department maintains there are other avenues to address to ensure proper application of cash deposit rates. Applying combination rates is just one of several avenues. The Department has a review process, which is retrospective in nature. We acknowledge our limited resources, but the Department maintains that Petitioners' theory suggests that lower rates tend to be more susceptible to misuse, and if this is occurring, the exporters with the low cash deposit rates would tend to be the companies with the largest exports, and thus more likely to be reviewed. Indeed, annual reviews are the intended statutory remedy for ensuring the appropriate application of assessment rates under an order. Additionally, while both Petitioners and the Department acknowledge not all "funneling" rises to

[18] Policy Bulletin 05.1, at 6-7 (April 5, 2005).

[19] Policy Bulletin 05.1, at 7 (April 5, 2005). ("The Department's previous practice of accounting for changes in producers during administrative reviews is not sufficient to prevent [improper funneling], because in many industries, producers can appear and disappear frequently prior to the administrative review.")

the level of inappropriate use of cash deposit rates or "fraud," we maintain that CBP's fraud provisions remain an available avenue when applicable.

E. CONCLUSION

For the foregoing reasons, the Department continues to find that (1) the application of a 216.01 percent adverse margin to be sufficiently corroborated; and (2) that the application of combination rates is not warranted in this administrative review.

Attachment 1

Margin Calculation Program Output

Not Available for Public Summary

Attachment 2

Margin Calculation Program Output Data – Range of Margins

Not Available for Public Summary